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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GEORGE PATAKI, *et al.*

Petitioners

v.

LOUIS GRUMET and CAROLINE C. SHIPLEY,

Respondents

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF OF THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF THE *AMICI*

Pursuant to Rule 37.3 of this Court,[1] The Becket Fund

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[1]All parties have consented to the filing of this brief. The letters of consent from the Petitioners and Respondents have been filed

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respectfully submits this brief *amici curiae* in support of Petitioners. The Becket Fund for Religious Liberty is a bipartisan and interfaith public interest law firm that protects the free expression of all religious traditions, including the ability of religious people and institutions to participate fully in public life. The Becket Fund engages in litigation in state and federal courts throughout the United States, both as primary counsel and as *amicus curiae*.

The Catholic League is the largest Catholic civil rights organization in America. Founded in 1973, the Catholic League defends the right of Catholics to participate in American public life without defamation or discrimination.

The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A."), founded in 1898, is the largest Orthodox Jewish umbrella organization in the United States. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the traditional Jewish community. The U.O.J.C.A. regularly files or joins in friend of the court briefs in cases that impact upon religious freedom in federal and state courts of all levels.

Amici believe that Chapter 390 of the Laws of 1997 accommodates the special educational needs of the children of Kiryas Joel in a manner that conforms to the constitutional requirements laid out in *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994).

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[1](...continued)
simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief.

REASONS FOR GRANTING THE WRIT

The New York Court of Appeals struck down Chapter 390 in part because it thought the statute had an invalid "origin." Pet. App. A at 20a. That "origin" was the fact that Chapter 390 was intended to accomplish the same goals of an earlier statute invalidated in *Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994)–the accommodation of the special educational needs of children living in Kiryas Joel. The Court of Appeals gave short shrift to the fact that Chapter 390, unlike its predecessor, accomplishes this goal through a generally applicable statute that does not make distinctions based on religion, either facially or otherwise.[2]

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[2]The Court of Appeals admitted that Section 390 sets forth facially neutral criteria for allowing creation of new school districts. Pet. App. A at 11a. Moreover, the Court of Appeals did not question the validity of the policy justifications behind the individual criteria, which focus on the number of children in the new school district, the new district's impact on enrollment in the existing school district, and the new district's funding implications. *See* Pet. App. A at 8a. As the dissent noted, "the recognized population and wealth criteria are the typical factors used in effective legislation." Pet. App. A. at 28a. None of the criteria are intended to draw lines that include communities of Satmar Hasidim and exclude other similarly situated communities. Two municipalities currently meet the criteria for forming a school district set forth in Chapter 390, Pet. App. A at 11a, and there are ten identified geographical areas that would immediately be eligible if they chose to incorporate. Pet. at 13 n.1. Moreover, the criteria are laid out in general terms that could apply to numerous other areas in the future. Chapter 390 is thus characterized by "neutrality as among

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Rather, as an important part of its analysis, the Court of Appeals focused its gaze on the fact that Chapter 390 was enacted in the aftermath of the earlier statutes' demise. Pet. App. A at 18a. This holding conflicts with the precedents of this Court and Establishment Clause decisions in the lower courts, most recently the United States Court of Appeals for the Third Circuit in *ACLU-N.J. v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999).

A. The Court of Appeals' Decision Conflicts with this Court's Teaching on the Nature of Judicial Review

The lower court's reliance on the origin of the statute, that is, the history of the legislature's attempts to accommodate the special educational needs of the children of Kiryas Joel, conflicts with the very nature of judicial review. Underlying the New York Court of Appeal's decision below, so obvious as to go without need of citation, is *Marbury v. Madison*, 5 U.S. 137 (1803). *Marbury* firmly established the principle that the Constitution is the supreme law of the land and began the concept of judicial review of acts of legislatures. But *Marbury* did more than that. It set in motion a process of dialogue between the courts and the legislatures, in which the courts guard the constitutional limits of permissible legislation, and the legislatures strive to act within those boundaries, all in pursuit of the common goal of

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[2](...continued)
religions," *see Kiryas Joel I*, 512 U.S. at 707, is "a generally applicable scheme" that "set[s] forth neutral criteria that a village must meet to have a school district of its own," *id.* at 717 (O'Connor, J., concurring), and is a religion-neutral statute that does not "use religion as a line-drawing criterion." *Id.* at 728 (Kennedy, J., concurring).

just and effective governance.

As Justice Jackson famously explained, "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Or as Justice Ginsburg has observed, "[The judiciary does] not alone shape legal doctrine . . . but they participate in a dialogue with other organs of government, and with the people as well." Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

These principles have particular force in the area of judicial review of the constitutionality of statutes. Legislatures frequently look to a court decision striking down a statute, and craft a new statute aimed at fulfilling the legislative purpose of the original, now-invalidated statute, but in a manner that complies with the Constitution. As one commentator explained:

> If [the actions of the political branches] are challenged in the judicial arena, courts may affirm or invalidate, but even in the latter case the colloquy between the branches continues. Congress can rewrite the statute, preparing it for another round of litigation, or may decide to present essentially the same statute in later years to a court with a changed composition. At times the judiciary invites Congress to pass legislation that challenges previous decisions.

LOUIS FISHER, CONSTITUTIONAL DIALOGUES:

INTERPRETATION AS POLITICAL PROCESS 8 (1988).

One notable example is the policy enacted by New York City in response to *Aguilar v. Felton*, 473 U.S. 402 (1985). In *Aguilar*, this Court struck down the City of New York's practice of providing remedial services to children in parochial schools by sending public school teachers into parochial schools. Subsequently, the City of New York, acting on a suggestion in Justice O'Connor's dissent in *Aguilar*, 473 U.S. at 431 (O'Connor, J., dissenting), adopted an alternative plan for providing services which included teaching the children in vans just off school grounds. *See Agostini v. Felton*, 117 S. Ct. 1997, 2005 (1997). New York City thus crafted a way to continue to pursue its goal of providing remedial services to parochial school students by altering its policies to comply with the *Aguilar* decision. Indeed, one could even argue that the City altered its policy just enough to skirt the *Aguilar* decision, moving the site of instruction just off the grounds of the parochial schools. Such tailoring of policy to comply with court rulings is in our best traditions of constitutional cooperation between the legislative branch and the courts. But under the Court of Appeals of New York's reasoning below, New York's "*Aguilar*" trailer should have been viewed as a highly suspect program of evasion. The "origins" of the trailer policy–the previous policy and the *Aguilar* lawsuit–should have tainted it, according to the reasoning of the New York Court of Appeals.

Another noteworthy example of the colloquy between the courts and legislature is abortion. After this Court struck down portions of the abortion laws of Georgia and Texas in *Roe v. Wade*, 410 U.S. 113 (1973), numerous states enacted a wide range of provisions relating to the procedure, some of which were upheld, and some of which were struck down. *Compare Webster v. Reproductive Health Services*, 492 U.S.

490 (1989) (upholding viability-testing requirement before performing an abortion on a fetus of twenty or more weeks of gestational age) *with Colautti v. Franklin*, 439 U.S. 379, 381 n.1 (1979) (striking down as unconstitutionally vague Pennsylvania law requiring doctor to determine "based on his experience, judgment or professional competence" if there was "sufficient reason to believe the fetus may be viable"). These measures enacted by states stood or fell based on the Court's substantive judgments. They did not stand or fall based on whether or not they were drafted to fall just within the limits of *Roe*. They all plainly were.

This Court's rulings on death penalty statutes similarly reflect a judicial-legislative colloquy. In response to *Furman v. Georgia*, 408 U.S. 238 (1972), and its companion cases, at least 35 states enacted new death-penalty statutes in an attempt to pursue their penological objectives in a manner consistent with the Court's ruling in *Furman*. *See Gregg v. Georgia*, 428 U.S. 153, 179-80 & n.23 (1976). Reviewing these new statutes, this Court found some to have corrected the flaws identified in *Furman*. *See, e.g.*, *Gregg*, 428 U.S. at 196-206 (plurality) (upholding Georgia statute); *Proffitt v. Florida*, 428 U.S. 242, 259 (1976) (plurality) (upholding Florida statute). Others that had not brought their statutes into compliance with the Constitution were struck down. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality); *Roberts v. Louisiana*, 428 U.S. 325, 336 (1976) (plurality). In the case of *Woodson* and *Roberts*, the process of the Court defining limits and the legislature responding continued: North Carolina and Louisiana both subsequently enacted yet another generation of capital punishment statutes in response to those decisions. *See Coker v. Georgia*, 433 U.S. 584, 594 (1977).

No one seriously suggests that states could not continue

to enact death penalty statutes because their earlier attempts exceeded constitutional boundaries. Yet that, in essence, is the remarkable position taken by the lower court in this case with respect to the Establishment Clause when it invalidated Chapter 390 in part because of its "origin." This is all the more troubling because the precise contours of the Establishment Clause are at least as difficult to discern as the contours of the Eighth Amendment at the time of *Furman*. *See, e.g., Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("our Establishment Clause jurisprudence is in hopeless disarray"). The lower court's idiosyncratic conception of judicial review is one this Court should not tolerate.

B. The Decision Below Conflicts with a Recent Decision of the Third Circuit.

If allowed to stand, the decision below threatens mischief in the lower courts. Its once-unconstitutional-always-unconstitutional logic is squarely in conflict with a recent decision of the Third Circuit, *ACLU-N.J. v. Schundler*, 168 F.3d 92, 105 (3d Cir. 1999) ("*Schundler II*"), as well as a decision of the Seventh Circuit.

In *Schundler II*, the Third Circuit evaluated the constitutionality of a holiday display containing religious and secular elements that was erected after a prior holiday display had been ruled unconstitutional. *See ACLU-N.J. v. Schundler* 104 F.3d 1435 (3d Cir. 1997) (*Schundler I*). In upholding the display, the *Schundler II* Court specifically rejected the argument that the revised display was an attempt at evasion. Writing for the court, Judge Alito observed:

> [T]he Supreme Court's decisions regarding holiday displays have been marked by fine line-drawing, and therefore it is not easy to determine whether particular displays satisfy the Court's standards. Under these circumstances, the mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith.

168 F.3d at 105. *Cf. Bear Lodge Multiple Use Association v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998) (upholding policies by the National Park Service to accommodate access of Native Americans worshipers to Devil's Tower National Park that were adopted by the Park Service after the court had struck down similar accommodations as violating the Establishment Clause), *aff'd*, No. 98-8021 (10th Cir. Apr. 26, 1999).

Similarly, in *Mather v. Village of Mundelein*, 864 F.2d 1291 (7th Cir.), *reh'g denied*, 869 F.2d 356 (1989), the Seventh Circuit upheld the display of a creche in front of a village hall that had various secular seasonal symbols added "after questions had been raised about the propriety of displaying a creche on public property." *Id.* at 1292. Following *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court upheld the display, holding that "[t]he point of *Lynch* . . . is that the context–the context of the ensemble, and more important the context of the secular holiday the government observes–is the controlling consideration." *Id.* at 1293. In short, the court focused solely on the revised display, and did not think it untoward that any changes had been made to comply with constitutional requirements.

Thus the lower federal courts have recognized that it is a natural part of our constitutional democracy that government

actors frequently revise the means by which they pursue their goals in response to direction from the courts. Such a process was the "origin" of Chapter 390. The Court of Appeals erred in holding that this "origin" tainted the legislation. Pet. App. A at 20a.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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